Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

SALOME FIERROS,

Petitioner,

v.

TEXAS DEPARTMENT OF STATE HEALTH SERVICES, SUCCESSOR IN INTEREST TO THE FORMER TEXAS DEPARTMENT OF HEALTH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth Circuit, on January 11, 2007, affirmed the district court's decision in a suit by Petitioner Salome Fierros against her employer, the Texas Department of Health (TDH). Petitioner's lawsuit alleged both discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a) *et seq*. On November 21, 2001, the Fifth Circuit determined that the jury could properly consider certain disciplinary actions as indications of TDH's retaliatory motives in failing to promote or transfer Petitioner. TDH, at a February 12, 2004, hearing, admitted liability for unlawful discriminatory/retaliatory employment practices against Petitioner. At the jury trial on compensatory damages beginning August 10, 2004, the district court prohibited Petitioner from testifying about the disciplinary actions TDH used as retaliation against her. By limiting this testimony, the district court denied the jury the opportunity to assess accurate and complete damages for Petitioner's past and future mental anguish. The district court also improperly denied Petitioner the jury award for out-of-pocket expenses.

Four questions are presented:

1. Did the district court improperly limit the scope of Petitioner's testimony regarding the disciplinary counseling sessions despite the Fifth Circuit's initial ruling that the jury could properly consider these actions as indications of Respondent's retaliatory motives in failing to promote or transfer Petitioner?

QUESTIONS PRESENTED – Continued

2. Would such limitation hinder the jury's ability to make an accurate assessment of Petitioner's past and future mental anguish and, thus, affect Petitioner's substantial right for full and complete compensatory damages as redress for her grievances?

3. Did the district court improperly deny the jury award for out-of-pocket expenses despite the fact that Petitioner's testimony provided sufficient and necessary evidence that more than adequately corroborated the basic necessity for such expenses?

4. Did the actions of the district court to limit Petitioner's testimony and deny her the jury award for out-of-pocket expenses effectively undermine the remedial and humanitarian purposes of Title VII?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this appeal is reported at *Fierros v. Texas Department of Health*, 2007 WL 98353 (5th Cir.). *See* Appendix A. The Fifth Circuit affirmed the February 3, 2005, decision of the United States District Court for the Western District of Texas reported at *Fierros v. Texas Department of Health*, 2005 WL 357668 (W. D. Tex.). *See* Appendix B. The Fifth Circuit decision from the first appeal is reported at *Fierros v. Texas Department of Health*, 274 F.3d 187 (5th Cir. 2001). *See* Appendix C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1331.

The Fifth Circuit's opinion was rendered on January 11, 2007. *See* Appendix A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, Section 2000e3(a).

Other unlawful employment practices.

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

> It shall be an unlawful employment practice for an employer to discriminate against any

> of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

1. For over twenty-five years, Petitioner, a Hispanic female, worked as a laboratory technician for the Texas Center for Infectious Disease, a department of TDH. In October 1996, Petitioner filed an internal complaint with TDH's Office of Civil Rights (OCR) against the Clinical Division Program Director, Douglas Arnold alleging that he had discriminated against her based on her ethnicity and gender. Specifically, Petitioner claimed that Arnold had discriminated against her by assigning her secretarial duties that a Hispanic male and a white female who were also laboratory technicians were not required to perform. Seven months later, in May 1997, Arnold denied Petitioner a merit pay increase of $57 per month that had been recommended by her immediate supervisor Timothy Carter.

After confronting Arnold about his denial of the merit pay increase, Petitioner filed another internal complaint

with the OCR alleging that she had been denied the pay increase in retaliation for filing the original OCR discrimination complaint against Arnold. She then filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging gender and national origin discrimination as well as retaliation in violation of Title VII.

While her EEOC charge was pending, Petitioner received two disciplinary "counseling sessions," one in September 1998 regarding purported abuse of the sick leave policy and another in November 1998 regarding purported inappropriate sexual behavior in the workplace. In response, Petitioner amended her EEOC charge to allege that TDH also retaliated against her by subjecting her to those two disciplinary actions. On June 4, 1999, the EEOC issued a determination on Petitioner's charges finding that "[b]ased upon the totality of the evidence, there is reasonable cause to believe that [TDH's] employment decisions were [retaliatory] as alleged with respect to [Petitioner's] being denied a merit increase and subjected to written counselings because she complained of discrimination."

The EEOC directed its determination of Petitioner's case to the U.S. Department of Justice (DOJ) for review. On September 28, 1999, the Civil Rights Division of the DOJ sent Petitioner a letter giving her notice of her right to file a Title VII action against TDH within ninety days of receipt of the letter. On December 16, 1999, Petitioner timely filed suit against TDH in federal district court claiming that TDH had retaliated and discriminated against her in violation of Title VII. On September 28, 2000, TDH filed an offer of judgment for $7500 plus costs and attorney's fees.

Shortly thereafter, TDH filed a motion for summary judgment on all claims by Petitioner which was granted by the district court on October 16, 2000. Petitioner appealed the summary judgment to th Fifth Circuit which, on November 21, 2001, reversed the district court's decision holding that Petitioner had stated an actionable claim of retaliation.

2. Petitioner filed her lawsuit against TDH on December 16, 1999. TDH filed a motion for summary judgment which was granted by the district court on October 16, 2000. Petitioner timely filed a notice of appeal to the Fifth Circuit. On November 21, 2001, the Fifth Circuit reversed the district court's decision and held that Petitioner had stated an actionable claim of retaliation. On remand, TDH stipulated liability and the case proceeded to a jury trial on compensatory damages beginning August 10, 2004. The jury awarded Petitioner $5,000 for mental pain and emotional distress and $2,880 for "out-of-pocket expenses." The district court dismissed the claim for out-of-pocket expenses on motion by TDH which claimed that Petitioner failed to show that the expenses were medically reasonable and necessary. The district court also denied Petitioner's motion for attorney's fees based upon Federal Rule of Civil Procedure 68 because the judgment Petitioner obtained was less than TDH's pre-judgment offer.

3. Petitioner timely filed the instant appeal based on the district court's dismissal of her claim for out-of-pocket expenses and for denial of attorney's fees on March 4, 2005. On January 11, 2007, the Fifth Circuit affirmed the district court's decision.

REASONS FOR ALLOWANCE OF THE WRIT

Whether the district court improperly limited Petitioner's testimony during trial thereby denying her the substantial right of allowing jurors to evaluate thoroughly all damages for her past and future mental anguish is an important question in the jurisprudence of Title VII litigation. The Fifth Circuit first rendered a decision in this case on November 21, 2001, after the district court granted summary judgment to TDH and dismissed Petitioner's case with prejudice.

During the trial on compensatory damages beginning August 10, 2004, the district court limited Petitioner's testimony despite the November 21, 2001, directive from the Fifth Circuit. The Fifth Circuit's decision held that even though two disciplinary counseling sessions endured by Petitioner did not constitute "ultimate employment decisions," they, nonetheless, provided evidence of TDH's retaliatory motives. Despite repeated efforts to develop this testimony during the trial, the district court prohibited Petitioner from testifying about these retaliations. The jury was effectively denied evidence of the counseling sessions and, therefore, Petitioner was denied the substantial right to establish her damages.

Furthermore, the issue of whether the district court improperly dismissed Petitioner's claim for a jury award for out-of-pocket expenses is important to issues relating to Title VII's fundamental purpose to provide remedial and comprehensive response to the problems of employment discrimination. This purpose will not be advanced by allowing TDH to escape payment for out-of-pocket expenses especially given the fact that TDH stipulated liability for its retaliatory conduct against Petitioner. To

continue along this principle will ultimately defeat Title VII's remedial purpose.

Review by this Court is also necessary to resolve a conflict among the circuit courts regarding the calculation of the "judgment later obtained" for purposes of comparing, as required by Federal Rule of Civil Procedure 68, whether Petitioner obtained a judgment more favorable than the offer she rejected.

I. REVIEW IS WARRANTED BECAUSE THE FIFTH CIRCUIT'S DECISION DIRECTLY AFFECTS PETITIONER'S SUBSTANTIAL RIGHT TO TESTIFY AND PROVIDE EVIDENCE REGARDING TDH'S RETALIATORY CONDUCT.

A. Contrary to the Fifth Circuit's Decision, Petitioner Properly Preserved Error Regarding the Exclusion of Testimony Concerning Past and Future Mental Anguish.

The Fifth Circuit, in its November 21, 2001, decision, held that certain counseling sessions directed against Petitioner were not "ultimate employment decisions" but noted that "even if the disciplinary actions do not amount to ultimate employment decisions, they may still evince [Respondent's] retaliatory motive. The Fifth Circuit continued: "[t]he jury could properly consider the disciplinary actions "as indications of [the employer retaliatory] motives in . . . fail[ing] to promote or transfer [Petitioner.].

At the trial on the merits beginning August 10, 2004, the district court – the Fifth Circuit's directive notwithstanding – precluded Petitioner from testifying about these disciplinary counseling sessions. The district court, after deliberating on Respondent's motion *in limine*

regarding scope of testimony upon admitted liability, prohibited Petitioner from discussing any of the details relating to these counseling sessions – including past and future mental anguish that she suffered as a result of this retaliatory actions by her employer.

The district court, in reaching its decision to exclude Petitioner's testimony regarding the counseling sessions, stated:

> . . . the defendants, having admitted liability, deserve fair treatment in regard to liability testimony. . . . the defendants don't deserve to be hit over the head with it. (R. 176; 28:13-19).

Undersigned counsel, in response, followed the procedure delineated in the FEDERAL RULES OF EVIDENCE to preserve a point for appeal. More specifically, Rule 103(a)(2) requires that "error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the part is affected," and "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." FED. R. EVID. 103(a)(2). Consistent with this requirement, undersigned counsel, informed the district court:

> . . . I think it would be detrimental to [Petitioner's] interest to focus exclusively on $57 merit pay increase [at the exclusion of the counseling sessions] because that creates a bit of a prejudice as far as the jury. (R. 176; 28:23-25 – 29:1).

But to ensure that the substance of Petitioner's testimony on the disciplinary counseling sessions was made known to the district court (even though the substance of the

evidence was apparent from the context within which the questions were asked), undersigned counsel continued:

> . . . we're trying to ensure that [Petitioner] will . . . be able to provide adequately the circumstances . . . leading up to and shortly thereafter, because these pain and suffering issues . . . as far as compensatory damages do continue even to this day and it's hard . . . to create a discrete compartmentalization of incidents – action versus reaction without providing and without having that ability to draw that connection over time.

An offer of proof is needed "so that the reviewing court could determine whether any error affected [Petitioner's] substantial rights." *Fidelity and Deposit Co. of Md. v. Reliance Federal Savings and Loan Ass'n*, 795 F.2d 42, 44 (7th Cir. 1986). The offer need not be formal nor the error precisely specified. *United States v. Sweiss*, 800 F.2d 684, 688 (7th Cir. 1986), *reh'g granted*, 812 F.2d 1023 (7th Cir. 1987). However, Petitioner needed to make the appropriate arguments to the district court that he now makes on appeal in order to alert the trial court to the issue. *Id.*

To this extent, Petitioner maintains that she satisfied Rule 103(a) criteria. The substance of her evidence was both made known to the district court and was apparent from the context. Additionally, a showing was made that the exclusion of Petitioner's testimony seriously hindered her ability to seek damages in this case and, thus, affected her substantial right to inform the jury regarding past and future mental anguish.

In the final analysis, the district court "exclude[d] the counseling session as part of the discussion here" despite

the fact that Petitioner made an appropriate offer of proof that preserved the point on appeal.

B. In the Alternative, Petitioner's Testimony Regarding the Disciplinary Counseling Sessions Is a Plain Error Affecting Her Substantial Rights That Was Not Brought to the Attention of the Court.

In the event the Fifth Circuit's January 11, 2007, holding is affirmed and this Court establishes that Petitioner failed to preserve challenge to the exclusion of evidence, Petitioner requests this Court, pursuant to FEDERAL RULE OF EVIDENCE 103(d), to take notice of "plain errors affecting substantial rights although they were not brought to the attention of the court." FED. R. EVID. 103(d).

A party challenging the exclusion of evidence has the burden of demonstrating that her substantial rights have been prejudiced by the exclusion. *Ellis v. City of Chicago*, 667 F.2d 606, 611 (7th Cir. 1981). In this case, the plain-error doctrine allows reversal in spite of the lack of an objection at trial if "the trial court's admission [or exclusion] of this evidence was a conspicuous error that was so likely to have changed the result that a retrial is necessary to avoid a miscarriage of justice." *United States v. Brimberry*, 744 F.2d 580, 585 (7th Cir. 1984) (*citing United States v. Silverstein*, 732 F.2d 1338, 1348 (7th Cir. 1984), *cert. denied*, 469 U.S. 1111, 105 S.Ct. 792, 83 L.Ed.2d 785 (1985)). *See also United States v. Serola*, 767 F.2d 364, 372 (7th Cir. 1985); *Wilson v. Attaway*, 757 F.2d 1227, 1242 (11th Cir.), *reh'g denied*, 764 F.2d 1411 (11th Cir. 1985).

The exclusion of Petitioner's testimony concerning the disciplinary counseling sessions directed against her in

retaliation for engaging in Title VII protected activity directly affected and, thus, changed the result of the jury's determination of compensatory damages including damages for past and future mental anguish. Once again, the Fifth Circuit, as a result of Petitioner's first appeal, reversed the district court and specifically indicated that "[t]he jury could properly consider the disciplinary actions as indications of [the employer retaliatory] motives in . . . fail[ing] to promote or transfer [Petitioner.]."

Despite this directive, during the trial in this matter, when Petitioner attempted to testify about the counseling sessions – one of the disciplinary actions taken by Respondent – the district court, nonetheless, restricted Petitioner's testimony and prevented her from testifying about disciplinary counseling sessions and her attendant mental anguish. As a result, substantial justice for Petitioner was denied and her substantial rights were directly prejudiced. *See Morreale v. Downing*, 630 F.2d 286 (5th Cir. 1980) (treating serious denial of a party's rights as plain error when it is apparent on the face of the appellate record); *see also Miley v. Delta Marine Drilling Company*, 473 F.2d 856, 857-58 (5th Cir. 1973) (excusing counsel's failure to object to trial judge's comments during trial on basis that "[w]here a trial judge's comments were so prejudicial as to deny a party an opportunity for a fair and impartial trial, the absence of objections will not preclude our review since counsel will be loath to challenge the propriety of the trial judge's utterances for fear of antagonizing him and thereby prejudicing a client's case.").

On at least two occasions during Petitioner's direct examination, Respondent objected because Petitioner's testimony touched upon the disciplinary counseling sessions. In the first instance, Respondent objected: "I hate

to interrupt, but we're really straying into the matters that dealt with on this morning's discussion." (R. 176; 69:25 – 70:1-2). In response, the district court directed Petitioner to "refocus." (R. 176; 70:5-6).

On the second occasion where the testimony began inching towards the disciplinary counseling sessions, Respondent objected once again: "Your Honor, again, we're going to object. We took that up this morning." (R. 176; 81:24-25). As a consequence, Petitioner was precluded from providing a full description to the jury of her circumstances in the wake of the retaliatory conduct directed against her. Without a complete understanding of the scope of such conduct, the jury was unable to appreciate fully the extent of Petitioner's circumstances as reflected in the limited compensatory damages awarded for both past and future mental anguish.

In the final analysis, the jury, was unable to grasp the context of Petitioner's circumstances in the wake of the retaliatory conduct directed against her and thus limited her compensatory damages for both past and future mental anguish. The failure to provide make-whole relief to Petitioner in accordance with the goal of Title VII constitutes a miscarriage of justice.

II. REVIEW IS WARRANTED TO DETERMINE THAT THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S AWARD TO PETITIONER FOR OUT-OF-POCKET EXPENSES.

The jury responded to the following interrogatory: "What amount of damages as shown below, if any, will fairly and reasonably compensate [Petitioner] for any injuries that were proximately caused by TDH's retaliation."

(R. 971). Listed as item "B" was the following: "Any out-of-pocket expenses or losses incurred as a result of [TDH's] retaliation against [Petitioner]." (R. 971). In response to item "B," the jury awarded Petitioner $2,880.00 for out-of-pocket expenses. (R. 971). The district court determined, however, in its Order of Judgment as a Matter of Law and Awarding Attorney's Fees that "there is insufficient evidence to support the jury's award of $2,880.00." (R. 1100). As a consequence, "[t]he final judgment entered in this cause will not include the jury's finding of $2,880.00 in out-of-pocket expenses." (R. 1101).

A. Contrary to District Court's Position, Documentary Support Was Not Required to Corroborate Out-of-Pocket Expenses Since Petitioner Provided Clear and Credible Testimony of These Expenses During the Trial.

During the trial in this matter, Petitioner provided clear and credible testimony with regards to out-of-pocket expenses:

Q: What sort of co-payments have you made . . . since May 16th of 1997?

A: Anywhere from $20 to $30 a visit.

Q: And how many visits have you made . . . ? . . . How many times have you seen a psychiatrist or psychotherapist in any given year?

. . .

Q: So, you're probably seeing a psychiatrist once a month?

A: Yes.

Q: And as far as the medications are concerned, are there any out-of-pocket expenses related to this?

A: The co-pay.

Q: And presumably, you've been on medication . . . since May of 1997?

A: I started the medication after Dr. Sullivan recommended I see . . . a psychiatrist that was in the summer of '99.

Q: What sort of out-of-pocket expenses have you incurred since that time?

A: It depends. Medications usually prescribed thirty – thirty day supply, the co-pay for the [Celexa] is $20. The Naprosyn, it's like $5. The Skelaxin is $10.

Q: So, approximately how much have you spent just on co-payments for medications?

A: At this time it's like $1200.00.

(R. 176; 78:21-25; 79:1-25; 80:1). Calculations for out-of-pocket expenses based on this testimony would include the following:

- At the low end: $2,960.00

  (1) based upon a $20.00 co-payment for a once-a-month visitation to a psychiatrist beginning May 1997 through August 2004 (88 months at $20.00/month = $1,760.00); plus

  (2) $1,200.00 for prescription drug co-payments.

- At the high end: $3,840.00

  (1) based upon a $30.00 co-payment for a once-a-month visitation to a psychiatrist beginning May 1997 through August 2004 (88 months at $30.00/month = $2,640.00); plus

  (2) $1,200.00 for prescription drug co-payments.

Yet, in arriving at its decision to exclude the out-of-pocket expenses awarded by the jury, the district court reasoned that:

> [Petitioner] admitted that a significant portion of her estimated expenses were incurred not as a result of [TDH's] retaliatory action but because of a back injury that pre-dated the denial of the merit pay increase. Further, [Petitioner] submitted no corroborating evidence to show that the expenses were medically necessary or brought about by the retaliation complained of here.

(R. 1101). In support, the district court relied upon *Romano v. Citizens Utility Co.*, 1999 WL 191457 (E. D. La.), as authority for the proposition "that a sworn affidavit from the plaintiff lacked documentary support and was not sufficient evidence to warrant an award of out-of-pocket expenses." (R. 1100).

The district court's reliance on *Romano* is misplaced because the basis of decision in that case is easily distinguishable from the facts of the instant matter. In *Romano*, "[b]efore deliberations commenced, the parties stipulated that the jury would determine the amount of emotional distress damages, if any, leaving the question of the availability of back pay, front pay, or other remedies for

the Court to resolve." 1999 WL 191457 at *1 (E. D. La.). After the jury rendered a verdict in his favor on his retaliation charge, Romano, the plaintiff, approximately one month after the verdict in his favor, filed a motion for damages that included his claims for incidental out-of-pocket expenses. *Id.* In support of this motion, Romano simply provided a sworn affidavit delineating his out-of-pocket expenses. *Id.* at *4.

In comparison with the record in this case, Petitioner provided credible and compelling testimony during the trial regarding her pain, suffering, and emotional distress:

> Q: How did you suffer as a consequence of all this?
>
> A: I couldn't sleep at night. I was at work all tense. All this tension was aggravating my back pain. I kept going to see the doctor for more medication and then I started worrying about taking the medication because I have to be very focused on what I'm doing.

(R. 176; 71:10-14). Petitioner provided additional testimony:

> Q: . . . Could you precisely identify the types of pain that you were suffering at the time to the benefit of the jury?
>
> A: . . . I was getting headaches. I felt nauseated. I couldn't eat. My hair started falling out. At lunch time or during breaks I would go to the bathroom just to cry to get some relief from this tension.
>
> Q: And what was the tension due to . . . ?
>
> A: The treatment that I was getting at work.

(R. 176; 73:11-20). Petitioner even testified, contrary to the district court's representation, that she began seeing a psychiatrist as a direct result of the retaliatory conduct directed against her:

> Q: Now, you mentioned you saw a doctor. What doctor were you seeing?
>
> A: At the beginning I was seeing Dr. [Helen] Sullivan. When I mentioned to her the extra tension that I was dealing with, she recommended that I go to the Alamo Mental Health Group to see a psychiatrist and kind of start talking to her about what I was dealing with at work.
>
> Q: Now, Dr. Sullivan was the physician attending to your back problems?
>
> A: Correct.
>
> Q: But she send [sic] you to another –
>
> A: Yes. She recommended that I go see a psychiatrist.

(R. 176; 71:15-25 – 72:1). "In certain cases a plaintiff's testimony alone may be sufficient proof of mental damages." *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 488 (5th Cir. 2001) (internal quotations and citations omitted). "Damages for emotional distress may be appropriate where the plaintiff suffers sleeplessness, anxiety, stress, marital problems, and humiliation." *Id.* (internal quotations and citation omitted).

Additionally, during the redirect, the following line of questioning established the approximate costs of Petitioner's out-of-pocket damages:

> Q: [C]an you give us an idea of the number of visitations you've made to psychiatrists or psychotherapists after May of 1997?
>
> A: Roughly, about twice a month.
>
> Q: Twice a month since May of 1997 and this would continue to –
>
> A: – today.

(R. 176; 100:18-24). Given her testimony, particularly with regards to the emotional anguish she suffered because of TDH's admitted violative conduct, Petitioner established her entitlement to out-of-pocket damages. *Salinas v. O'Neill*, 286 F.3d 827 (5th Cir. 2002).

As additional consideration, "[w]hile mathematical precision is not required to establish the extent or amount of one's damages, one must bring forward the best evidence of the damage of which the situation admits, and there must be some basis for reasonable inferences." *Gulf Coast Inv. Corp. v. Rothman*, 506 S.W.2d 856, 858 (Tex. 1974) (*citing* C. McCormick, The Law of Damages §§ 26, 27 (1935)).

In *Hollywood Fantasy Corp. v. Gabor*, this Court added the following:

> Although *Rothman* stated that a plaintiff must provide the "best evidence" of damages, the Texas Supreme Court used this term in the context of examining the requirement that a plaintiff must provide a basis for estimating damages sought. *Rothman* does not prevent the admission of oral testimony as evidence of damages, even when the oral testimony is based on documentary evidence. *See. e.g. Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480, 483

> (Tex. 1984) (noting that a witness's oral testimony was "competent evidence" of damages for breach of contract, without mentioning the need for production of supporting documentation); cf. *Holt Atherton*, 835 S.W.2d at 84 (noting that oral testimony alone may be sufficient to establish lost profits without the production of supporting documentation); *Pena v. Ludwig*, 766 S.W.2d 298, 304 (Tex. App. – Waco 1989, no writ) (stating in the context of recovery damages for lost profits that "[t]his court has not found any blanket requirement that a witness's testimony, which is based on first-hand knowledge of financial data, must be supplemented in every instance by the financial records from which actual knowledge is gained.").

151 F.3d 203, 212 (5th Cir. 1998).

Based on her testimony, Petitioner provided the jury the basis to make reasonable inferences with regards to her out-of-pocket expenses. Perhaps even more significantly, TDH never presented any evidence controverting Petitioner's testimony as to her out-of-pocket expenses.

B. The Jury Had Ample Opportunity Both to Evaluate the Credibility of Petitioner and to Hear Evidence from Petitioner Supportive of Its Verdict for Out-of-Pocket Expenses and, as Such, the District Court Should Have Upheld the Jury Award.

By ignoring the jury award for out-of-pocket expenses, the district court abused its discretion. The jury awarded Petitioner $2,880.00 for out-of-pocket expenses incurred as a result of TDH's retaliation against her. During the course of the trial, the jury heard evidence that supported

this verdict regarding expenses necessarily assumed by Petitioner for mental health professionals as well as prescription drugs to treat her depression and anxiety. The size of an award is within the province of the jury, so long as the award is not impermissibly affected by "passion or prejudice." *See Green v. Adm'rs of Tulane Educ. Fund*, 284 F.3d 642, 660-61 (5th Cir. 2002) ("[I]t would be improper to speculate about the nature of the jury deliberations, especially in light of the fact that there was no reason to suspect that the jury acted out of passion or prejudice."). It is the function of the jury as the traditional finder of facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses. *Boeing v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

C. In the Alternative, the District Court Erroneously Characterized the Jury Award for Out-of-Pocket Expenses as Past Medical Damages and, Therefore, Applied an Incorrect Standard for Review.

Although the case law cited by TDH correctly establishes the standard of review for evaluating "the kind of evidence that must be produced to support a verdict," these cases are inapplicable to the facts of the instant matter. *See Hamburger v. State Farm Mut. Auto. Ins. Co.*, 361 F.3d 875 (5th Cir. 2004), *quoting Ayres v. Sears, Roebuck & Co.*, 789 F.2d 1173, 1175 (5th Cir. 1986). *Hamburger* and the other cases cited by TDH stand for the general proposition that "[u]nder Texas law, a claim for past medical expenses must be supported by evidence that such expenses were reasonable and necessary." *Hamburger* at 886, *citing Six Flags Over Texas, Inc. v. Parker*,

759 S.W.2d 758, 760-61 (Tex. App. – Fort Worth [1st Dist.] 1984, writ ref'd n.r.e.). Irrefutably, the jury award in this case was for out-of-pocket expenses *not* for past medical expenses.

During the trial, Petitioner provided the following testimony:

> Q: Did you receive benefits through Texas Department of Health?
>
> A: Benefits?
>
> Q: Insurance. Medical insurance.
>
> A: Yes. Insurance. Through them.
>
> Q: So, when you did see these physicians, did your insurance cover it?
>
> A: Yes.
>
> Q: It covered all your costs . . .
>
> A: I have to pay the co-pay.

(R. 176; 71:9-20). In other words, the out-of-pocket expenses incurred by Petitioner were for co-payments required by her health insurance carrier. That these co-payments happened to be for medically-related treatment and prescriptions does not, however, convert such out-of-pocket expenses into a claim for past medical expenses. Notably, at no point during this litigation did Petitioner seek reimbursement of actual costs for either her medical treatments or prescriptions. Had she done so, the standard articulated by TDH requiring a claim for past medical expenses to be supported by evidence that such expenses were reasonable and necessary would prevail.

III. REVIEW IS WARRANTED TO UPHOLD THE REMEDIAL AND HUMANITARIAN UNDERPINNINGS OF TITLE VII.

Petitioner emphasizes the remedial and humanitarian underpinnings of Title VII. Abundant caselaw supports the general proposition that Title VII provides a remedial and comprehensive response to the problem of employment discrimination. *See, e.g., Sanchez v. Standard Brands*, 431 F.2d 455 (5th Cir. 1970) ("[Title VII] was designed to protect a worker from becoming an industrial pariah . . . ."]. Given that Title VII is "remedial legislation which must be construed liberally," the courts "should avoid technical interpretations" which would defeat the statute's remedial purpose. *Philbin v. Gen. Elec. Capital Auto Lease*, 929 F.2d 321 (7th Cir. 1991). In this instance, the district court should have afforded Petitioner the opportunity to describe the disciplinary counseling sessions so the jury would be in a position to assess accurately and completely compensatory damages in this case.

As a final observation, the availability of damages for out-of-pocket expenses comports with Title VII's goal of providing make-whole relief to victims of discrimination and retaliation. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-19, 95 S.Ct. 2362, 2371-72, 45 L.Ed.2d 280 (1975) ("It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination."; "The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.") (*quoting Wicker v. Hoppock*, 6 Wall. 94, 99, 18 L.Ed. 752 (1867)); *Hutchison v. Amateur Elect. Supply, Inc.*, 42 F.3d 1037, 1044 (7th Cir. 1994). Denying Petitioner her out-of-pocket expenses denies her the opportunity for make-whole relief

and egregiously undermines this fundamental Title VII goal.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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Attorney for Petitioner

2007 WL 98353

In the United States Court of Appeals
for the Fifth Circuit

No. 05-50460 Summary Calendar

SALOME FIERROS,

Plaintiff-Appellant,

v.

TEXAS DEPARTMENT OF HEALTH; ET AL.,

Defendants,

TEXAS DEPARTMENT OF HEALTH

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
No. 5:99-CV-1448

(Filed January 11, 2007)

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:*

The plaintiff in this case, Salome Fierros, sued the Texas Department of Health (TDH) for retaliation in

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

violation of Title VII. Fierros rejected TDH's offer of judgment for $7,500 plus costs and attorney's fees. In an earlier appeal, this court reversed summary judgment in TDH's favor, holding that Fierros stated an actionable claim of retaliation.[1] On remand, TDH stipulated liability, and the case proceeded to a jury trial on compensatory damages. The jury awarded Fierros $5,000 for mental pain and emotional distress and $2,880 for "out-of-pocket expenses." The district court dismissed the claim for out-of-pocket expenses on motion by TDH, which claimed that Fierros failed to plead for out-of-pocket expenses and failed to show that the expenses were medically reasonable and necessary. The district court also denied Fierros's motion for attorney's fees because the judgment Fierros obtained was less than TDH's pre-judgment offer.[2]

On appeal, Fierros challenges the district court's order denying attorney's fees, concluding that the district court erred in calculating the judgment obtained for purposes of determining whether she was entitled to attorney's fees. Specifically, Fierros complains: (1) the compensatory damages award may have been higher if the district court had not limited trial testimony about retaliatory disciplinary actions TDH took; (2) the district court erroneously denied her recovery for out-of-pocket expenses; and (3) the district court failed to include pre-offer attorney's fees and costs in determining the amount of the judgment obtained for purposes of Rule 68, which bars recovery of attorney's fees when the judgment obtained is less than a pre-judgment settlement offer.[3] Fierros concedes that if she

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[1] *Fierros v. Tex. Dep't of Health*, 274 F.3d 187 (5th Cir. 2001).

[2] *See* FED. R. CIV. P. 68.

[3] *Id.*

does not prevail on the first or second issue we need not consider the third issue because the judgment obtained will be less than the pre-offer judgment regardless of whether pre-offer attorney's fees and costs are considered to be part of the judgment obtained for the purposes of a Rule 68 comparison.

In retaliation for filing an EEOC complaint, TDH deprived Fierros of a merit pay increase and subjected her to disciplinary counseling sessions. In our prior decision in this case, we stated that the disciplinary counseling sessions could be used to prove a retaliatory motive.[4] On remand, TDH stipulated to liability, and the case proceeded to trial only on damages. Before the trial, the court asked Fierros about evidence to be submitted. In an informal discussion the district court told Fierros that she could not use evidence of the counseling sessions because there was no need to prove a retaliatory motive, and Fierros agreed. Fierros did not seek a definitive ruling or provide a detailed offer of proof explaining what evidence she would seek to prove during trial. Fierros now complains that evidence of the counseling sessions is pertinent to her compensatory damages. Because there was no definitive ruling on the exclusion of evidence regarding the counseling sessions and because Fierros failed to make an offer of proof, Fierros did not adequately preserve any error.[5]

Fierros also appeals the district court's failure to award the out-of-pocket expenses found by the jury. TDH argued that Fierros failed to plead for out-of-pocket

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[4] *Fierros v. Tex. Dep't of Health*, 274 F.3d 187, 196 (5th Cir. 2001).

[5] *See* FED. R. EVID. 103.

expenses and failed to prove that the expenses were medically reasonable and necessary. The district court held that even if Fierros's claim for out-of-pocket expenses was supported by the pleadings, Fierros failed to present sufficient evidence.

We review the district court's grant of a motion for judgment as a matter of law *de novo*.[6] We apply federal standards of review to assess the sufficiency or insufficiency of the evidence in relation to the verdict, but in doing so we refer to state law for the evidence that "must be produced to support a verdict."[7] To recover out-of-pocket medical expenses in Texas, a plaintiff must present evidence that the expenses incurred were reasonable and necessary.[8] Mere testimony from the plaintiff alone is not enough.[9]

At trial, Fierros testified that she had spent approximately $1,200 on co-payments for three prescription medications as well as between $20 and $30 a month in co-payments for psychiatrist and physician visits. On cross-examination, however, Fierros admitted that two of the three prescriptions were for conditions that predated the retaliatory actions and were unrelated although allegedly exacerbated. Fierros also admitted that an unknown number of the physician visits were due to recurring allergies and sinus infections and that an unknown

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[6] *Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1042 (5th Cir. 1998).

[7] *Hamburger v. State Farm Mut. Ins. Co.*, 361 F.3d 875, 884 (5th Cir. 2004) (quoting *Ayres v. Sears, Roebuck & Co.*, 789 F.2d 1173, 1175 (5th Cir. 1986)).

[8] *Id.* at 884.

[9] *Id.*

number of the psychiatrist visits were for an unrelated incident involving her sister. Other than her own testimony, Fierros did not present any evidence of the out-of-pocket expenses she allegedly incurred, and she submitted no evidence that the expenses incurred were reasonable or necessary. Even if Fierros's pleadings requesting "other and further relief as the Court may deem just and proper" are a sufficient prayer for out-of-pocket expenses, a question we need not decide, Fierros failed to submit evidence that the expenses incurred were medically reasonable or necessary.

Because Fierros has not prevailed on the first two issues, we do not consider Fierros's argument that her pre-offer attorney's fees and costs should have been included in the judgment for purposes of a Rule 68 comparison. Thus the district court's judgment is affirmed in all aspects.

AFFIRMED.

2005 WL 357668

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SALOME FIERROS, Plaintiff,	§	
v.	§	No. SA-99-CV-1448-RF
TEXAS DEPARTMENT OF HEALTH, Defendant.	§	

ORDER OF JUDGMENT AS A MATTER OF LAW AND AWARDING ATTORNEY'S FEES

(Filed Feb. 3, 2005)

BEFORE THE COURT is Defendant's post-trial Motion for Judgment as a Matter of Law, filed on October 15, 2004, along with various responses and replies from Plaintiff Salome Fierros and Intervenor Russell Amsberry. Also before the Court are the parties' requests for attorney's fees to be awarded on conjunction with the jury verdict in this cause entered on August 10, 2004. Having carefully considered the arguments, the applicable law, and the facts before it, the Court has determined that the Defendant's motion is meritorious, and will GRANT Defendant's Motion for Judgment as a Matter of Law (Docket No. 163). The Court here also enters its determination on the issue of attorney's fees in this matter.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Salome Fierros, complains that Defendant retaliated against her in violation of Title VII.[1] Plaintiff has been employed as a Lab Technician at the lab of the Texas Center for Infectious Disease, a department of the Texas Department of Health ("TDH") for over twenty-five years. After initially filing a claim with the Equal Opportunity Employment Commission ("EEOC") and obtaining a right to sue letter, Plaintiff filed a complaint in District Court. Thereafter, the Court granted Defendant's motion for summary judgment on all claims. Plaintiff appealed that order, and the Fifth Circuit reversed and remanded the cause for consideration of Plaintiff's claim that she was denied a merit raise in 1997 due to her having filed a discrimination charge in 1996.[2] Thereafter, the parties agreed that the sole issue remaining before the Court was the scope of damages to which Plaintiff was entitled as relating to her claim that she was denied a $57 per month pay raise in May 1997.

On May 25, 2004, the Court granted in part and denied in part Defendant's motion for summary judgment as to the various types of damages available to Plaintiff. The Court determined at that time that punitive damages were unavailable to Plaintiff in her Title VII suit against an entity of the State of Texas. As to the issue of back pay, the Court held that, when final judgment is entered, the Court will award back pay damages for the thirty-two month period of May 1997 through December 1999 at the

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[1] 42 U.S.C. § 2000e *et seq.*

[2] *See Fierros v. Texas Dep't of Health,* 274 F.3d 187, 192 (5th Cir. 2001).

rate of $57 per month. According to the Court's calculation, the award for back pay at final judgment will approximate $1,824, less any appropriate withholdings to be determined. Finally, the Court held that on the record before it at the time, there was not enough evidence to grant summary judgment for the Defendant on the issue of back pay and reserved this issue for trial. (Docket No. 134).

The Court held a jury trial beginning August 10, 2004, on the issue of Plaintiff's compensatory damages for unlawful retaliation. On the same day the jury reached a verdict, awarding Plaintiff Fierros a total of $7,880 in damages, including $5,000 as compensation for mental pain, humiliation, embarrassment, depression, anger, and emotional distress and $2,880 as compensation for out-of-pocket expenses.

Following the close of evidence, Defendant made an oral motion in open court for judgment as a matter of law on the issue of Plaintiff's out-of-pocket expenses, arguing that there were no pleadings and insufficient evidence to support a jury finding regarding these expenses. The Court denied this motion and allowed the question to be submitted to the jury. By the instant motion, Defendant reasserts its Motion for Judgment as a Matter of Law.

DISCUSSION

I. Defendant's Motion for Judgment as a Matter of Law Regarding Plaintiff's Out-of-Pocket Expenses

At trial in this matter, Plaintiff was not allowed to present any documentary evidence to support her claim for out-of-pocket expenses, because she sought to tender the evidence on the morning of trial without any prior notice.

Defendant argued in its motion in limine that the evidence should be excluded due to surprise and contended that Plaintiff had not raised the issue of her out-of-pocket expenses in pleadings in this matter and that the evidence should also be excluded for this reason. The Court subsequently granted Defendant's motion in limine, ordering that the documentary evidence of Plaintiff's out-of-pocket expenses would not be admitted.

As a result, the only evidence in the record of these expenses is Plaintiff's oral testimony that the expenses amounted to around $1,200. Further, there is no testimony in the record that the expenses forming the basis of this estimate were medically necessary or brought about by the Defendant's retaliation. In *Romano v. Citizens Utility Co.*, a district court which heard a similar retaliation case found that a sworn affidavit from the plaintiff lacked documentary support and was not sufficient evidence to warrant an award of out-of-pocket expenses.[3]

On cross-examination, Plaintiff admitted that her estimate of $1,200 was based primarily on costs associated with three prescription drugs, two of which were prescribed prior to the complained-of retaliation. She also admitted that much of this medication was prescribed for a back injury that similarly predated Defendant's retaliatory action.

Plaintiff responds, arguing that her First Amended Petition was filed *pro se* and that her pleadings were sufficient to support a jury finding regarding out-of-pocket expenses. Specifically, Plaintiff points to the perfunctory

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[3] *See* 1999 WL 191457, at *4 (E.D. La.).

language included in her prayer for relief asking the Court to "[g]rant such other relief as the Court may deem just and proper."[4]

Putting aside Plaintiff's failure to plead for out-of-pocket expenses, the Court finds that there is insufficient evidence to support the jury's award of $2,880. Plaintiff admitted that a significant portion of her estimated expenses were incurred not as a result of Defendant's retaliatory action but because of a back injury that predated the denial of the merit pay increase. Further, Plaintiff submitted no corroborating evidence to show that the expenses were medically necessary or brought about by the retaliation complained of here. When viewed in light of the Plaintiff's answers upon cross-examination, the Court finds no basis upon which to uphold an award of $2,880 for these expenses.

As a result, the Court will grant Defendant's Motion for Judgment as a Matter of Law as to Plaintiff's out-of-pocket expenses. The final judgment entered in this cause will not include the jury's finding of $2,880 in out-of-pocket expenses.

II. Requests for Attorney's Fees

Also before the Court are Intervenor Russell Amsberry's Application for Attorney's Fees, filed on August 30, 2004 (Docket No. 157) and Plaintiff's Motion for Attorney's Fees, files on September 1, 2004 (Docket No. 159). Intervenor was Plaintiff's counsel from 1999 until July 2002, when he withdrew as counsel. On October 16, 2000,

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[4] Plf.'s Reply at 2; Plf.'s First Amend. Comp., at 6.

this Court granted summary judgment for Defendant TDH, dismissing Plaintiff's retaliation claim. (Docket No. 26). Intervenor represented Plaintiff in her appeal of this decision to the Fifth Circuit Court of Appeals, which on November 21, 2001 reversed the Court's summary judgment decision.[5] Intervenor subsequently represented Plaintiff on remand to this Court, until he withdrew as counsel on July 10, 2002. (Docket No. 47).

This Court earlier granted Mr. Amsberry's motion to intervene and now turns its attention to his request for attorney's fees. The Court held an initial hearing on the matter of attorney's fees on September 1, 2004, at which time it heard arguments from Plaintiff and Intervenor as to the appropriateness of a fee award in this matter. Plaintiff also seeks attorney's fees for present counsel. The Court requested additional briefing and now enters its award of attorney's fees.

Intervenor compiled the work done on behalf of Plaintiff, multiplied by the rate of $175 per hour for trial work and $225 for his work at the appellate level. In sum, Intervenor requests $51,797.50 in attorney's fees for work performed through August 26, 2004.

Defendant responds, asserting that it had filed a valid Offer of Judgment in September 2000, which proposed a settlement of $7,500 plus costs and attorney's fees and additional consideration in the form of pay raises. Plaintiff did not accept this offer, and Defendant argues that any potential attorney's fees in this matter should be reduced as a result.

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[5] *Fierros v. Texas Dep't of Health*, 274 F.3d 187.

Federal Rule of Civil Procedure 68 requires the prevailing plaintiff to pay all costs incurred after an offer of judgment when the plaintiff does not accept the defendant's offer of judgment which is more favorable than the judgment which the plaintiff ultimately obtains.[6] The operation of Rule 68 is mandatory, leaving no room for district court discretion.[7] Once it rejects an offer of judgment, a prevailing plaintiff may not recover otherwise awardable costs incurred after the date of the offer and most courts also hold that plaintiff must pay defendant's costs incurred after that date.[8] In *Marek v. Chesny,* the Supreme Court held that where the underlying statute includes attorneys fees as recoverable "costs," the prevailing party who does not achieve an award more favorable than the Rule 68 judgment offer is not entitled to attorney's fees incurred after the offer.[9]

Rule 68 only applies when the judgement plaintiff ultimately obtains is less favorable than the offer of judgment.[10] Generally speaking, this requires the court to compare two amounts: the amount of the judgment and the amount finally obtained by the plaintiff.[11] As commentators have noted, this determination is not always

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[6] FED. R. CIV. P. 68; *Johnston v. Penrod Drilling Co.,* 803 F.2d 867, 869 (5th Cir. 1986); *Marek v. Chesny,* 473 U.S. 1, 5 (1985).

[7] *Johnston,* 803 F.2d at 869; 12, WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE & PROCEDURE: § 3006, at 120 (2d ed. 1997).

[8] WRIGHT, MILLER & MARCUS, § 3006, at 121 (citing authority holding that plaintiffs had to pay defendants' costs).

[9] *Marek v. Chesny,* 473 U.S. at 9-12. See also the appendix to Justice Brennan's dissenting opinion, listing Title VII as a statute that includes attorney's fees as part of "costs." *Id.* at 47.

[10] *See, e.g., Johnston,* 803 F.2d at 868.

[11] *See Louisiana Light & Power Co. v. Kellstrom,* 50 F.3d 319, 334 (5th Cir. 1995).

straightforward, because the judgment figure should be augmented to include an amount for costs if they were not treated separately in the offer.[12] If the costs were specified or provided for in the offer of judgment, then costs need not be added to the judgment figure for the sake of comparison.

Defendant argues that the operation of Rule 68 here would preclude Intervenor's claims for fees after the entry of the offer in September 2000. Defendant argues that Intervenor's award of fees should be at the most $10,193.75, an amount Defendant reached by multiplying the hours Intervenor worked prior to September 2000 by Intervenor's requested rate of pay.[13]

Plaintiff replies, seeking an award of $21,568.75 in attorney's fees for Plaintiff's counsel. Plaintiff seeks an award for counsel of fees from the Court for representation beginning March 11, 2004, when Plaintiff's current counsel entered his appearance on her behalf. (Docket No. 128). Plaintiff also objects to Defendant's arguments regarding the operation of the offer of judgment filed by Defendant in 2000, and contends without support that Rule 68 does not impact the Court's award of attorney's fees here.

As indicated at the initial hearing on attorney's fees held on September 1, 2004, the Court believes that an

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[12] WRIGHT, MILLER & MARCUS, § 3006, at 122-25.

[13] Analyzing Intervenor's Application for Attorney's Fees and related documents in support, the Court finds that Intervenor spent approximately 37.25 hours on Plaintiff's case. If multiplied by Intervenor's requested rate of $175 per hour, this yields a pre-offer attorney's fee amount of $6518.75, by the Court's calculation.

award of attorney's fees would be equitable in this situation. As a result, the Court initially informed parties at the September 1 hearing that it intended to award both Intervenor and Plaintiff's current counsel attorney's fees for their work on Plaintiff's behalf.

However, it is clear that Rule 68 and cases decided under it take the issue of attorney's fees in this matter outside the Court's discretion. As set forth above, Rule 68 requires the Court to compare the value of an unaccepted offer of judgment with the value of the judgment later obtained.

Here, Defendant's Offer of Judgment was tendered on September 28, 2000 and proposed a judgment of $7,500, plus costs and attorney's fees, plus a prospective pay raise "by the amount Plaintiff would have received if given a pay raise in May, 1997." In his application for attorney's fees, Intervenor states that he had spent approximately 37.25 hours on Plaintiff's case up to and including work performed related to the offer of judgment. Multiplying 37.25 hours times the hourly rate of $175 would yield fees of approximately $6,518.75. There is little evidence before the Court on costs incurred in the prosecution of Plaintiff's case up to the offer of judgment, other than the $150 filing fee. Thus, on the evidence before it, the Court finds that the offer of judgment was worth at least $14,168.75.

To finish the analysis, the Court must compare that figure with the judgment that will be entered for Plaintiff. As set forth above, the jury awarded Plaintiff $7,880 in damages. This figure included $5,000 as compensation for mental anguish damages and emotional distress and $2,880 as compensation for out-of-pocket expenses. The Court has already determined that there is insufficient

evidence in the record to support the jury's award of out-of-pocket expenses. The Court will not award this component of damages. Additionally, the Court has determined that Plaintiff's final judgment will include $1,824 in back pay for the $57 merit pay increase for the thirty-two month period at issue. Thus, the Court will enter judgment for Plaintiff in the amount of $6,824.

Comparing the two figures, it is clear that the judgment Plaintiff ultimately obtains ($6,824) will be less favorable than the Defendant's Offer of Judgment in September 2000 ($14,168.75). As a result, Rule 68 applies, and the Court is without discretion to award Plaintiff attorney's fees or other costs for the period after September 2000.[14] Since it may award attorney's fees for work performed up to this point, the Court will grant Intervenor's Application for Attorney's Fees and award Intervenor $6,500, as indicated at the hearing on this issue. However, due to the operation of Rule 68, the Court may not award Plaintiff fees or costs associated with post-offer representation, including attorney's fees for her current counsel. Thus, the Court must deny Plaintiff's Motion for Attorney's Fees.

CONCLUSION

Accordingly, it is ORDERED that Defendant's Motion for Judgment as a Matter of Law (Docket No. 163) is hereby GRANTED as to the jury verdict for out-of-pocket expenses.

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[14] *Johnston*, 803 F.2d at 869; 12, WRIGHT, MILLER & MARCUS, § 3006, at 120.

It is further ORDERED that Plaintiff's claim for out-of-pocket expenses is DISMISSED WITH PREJUDICE.

It is further ORDERED that Intervenor's Application for Attorney's Fees (Docket No. 157) be GRANTED and Intervenor Russell Amsberry is awarded $6,500.

It is further ORDERED that Plaintiff's Motion for Attorney's Fees (Docket No. 159) be DENIED for the reasons set forth above.

Signed this 3rd day of February, 2005.

/s/ Royal Furgeson
ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

274 F.3d 187

Salome FIERROS, Plaintiff-Appellant,
v.
TEXAS DEPARTMENT OF HEALTH, Defendant-Appellee.
No. 00-51212.

Nov. 21, 2001.

Russell J.G. Amsberry (argued), San Antonio, TX, for Plaintiff-Appellant.

Heather Leigh Horton, Asst. Atty. Gen. (argued), Jeffrey Alan Armstrong, Asst. Atty. Gen., James C. Todd, Asst. Atty. Gen., Austin, TX, for Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas.

Before KING, Chief Judge, and DUHÉ and BENAVIDES, Circuit Judges.

KING, Chief Judge:

Plaintiff-Appellant Salome Fierros appeals from the district court's summary judgment dismissing her Title VII retaliation claim. For the following reasons, we REVERSE the district court's judgment and REMAND to that court for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

For over twenty-five years, Plaintiff-Appellant Salome Fierros, a Hispanic female, worked as a laboratory technician for the Texas Center for Infectious Disease, a department of the Texas Department of Health ("TDH"). In October 1996, Fierros filed an internal complaint with TDH's Office of Civil Rights ("OCR") against the Clinical

Division Program Director, Douglas Arnold, alleging that he had discriminated against her based on her ethnicity and gender. Specifically, she claimed that Arnold had discriminated against her by assigning her secretarial duties that a Hispanic male and a white female who were also laboratory technicians were not required to perform. Seven months later, in May 1997, Arnold denied Fierros a merit pay increase of $57 per month that had been recommended by her immediate supervisor, Timothy Carter.

After confronting Arnold about his denial of the merit pay increase, Fierros filed another internal complaint with the OCR alleging that she had been denied the pay increase in retaliation for filing the original OCR discrimination complaint against Arnold. She then filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging gender and national origin discrimination and retaliation in violation of 42 U.S.C. §§ 2000e-2(a) and 2000e-3(a) (1994) ("Title VII").

While her EEOC charge was pending, Fierros received two disciplinary "counseling sessions," one in September 1998 regarding purported abuse of the sick leave policy and another in November 1998 regarding purported inappropriate sexual behavior in the workplace. Fierros amended her EEOC charge to allege that TDH also retaliated against her by subjecting her to these two disciplinary actions. On June 4, 1999, the EEOC issued a determination on Fierros's charges, finding that "[b]ased upon the totality of the evidence, there is reasonable cause to believe that [TDH's] employment decisions were [retaliatory] as alleged with respect to [Fierros's] being denied a merit increase and subjected to written counselings because she complained of discrimination." However, the EEOC concluded that the evidence did not support

Fierros's charge of gender and national origin discrimination. Because it found that TDH had violated Title VII, the EEOC recommended informal methods of conciliation.

The EEOC sent its determination of Fierros's case to the U.S. Department of Justice ("DOJ") for review. On September 28, 1999, the Civil Rights Division of the DOJ sent Fierros a letter giving her notice of her right to bring a Title VII action against TDH within ninety days of receipt of the letter. On December 16, 1999, Fierros timely filed suit against TDH in federal district court, claiming that TDH had retaliated against her in violation of 42 U.S.C. § 2000e-3(a). The district court granted TDH's motion for summary judgment on October 16, 2000, dismissing Fierros's retaliation claim. The district court subsequently extended the deadline for filing a motion for reconsideration of the summary judgment to November 10, 2000. Fierros filed her motion for reconsideration three days late, and the district court denied the motion.

On November 16, 2000, Fierros timely appealed the district court's summary judgment against her. On February 20, 2001, she filed a motion with this court to supplement the record on appeal with the exhibits that she had attached to her motion for reconsideration of the district court's summary judgment decision. According to Fierros, those exhibits were "treated as stricken" by the district court. This court denied her motion to supplement the record on March 12, 2001.

II. SUMMARY JUDGMENT STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo, applying the same Rule 56 standard as the district court. *Blow v. City of San Antonio,* 236 F.3d 293,

296 (5th Cir.2001) (citing Fed.R.Civ.P. 56). "Although summary judgment is not favored in claims of employment discrimination, it is nonetheless proper when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" *Waggoner v. City of Garland,* 987 F.2d 1160, 1164 (5th Cir.1993) (quoting Fed.R.Civ.P. 56(c)). In making a summary judgment determination, "[d]oubts are to be resolved in favor of the nonmoving party, and any reasonable inferences are to be drawn in favor of that party." *Evans v. City of Bishop,* 238 F.3d 586, 589 (5th Cir.2000). The Supreme Court recently emphasized the paramount role that juries play in Title VII cases, stressing that in evaluating summary judgment evidence, courts must refrain from the making of "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts," which "are jury functions, not those of a judge." *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (quoting *Anderson v. Liberty Lobby,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

III. TITLE VII RETALIATION CLAIM

Under 42 U.S.C. § 2000e-3(a), it is

> an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (1994). In order to establish a prima facie case of retaliation under § 2000e-3(a), a plaintiff must demonstrate: "(1) that she engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse employment action." *Evans v. City of Houston,* 246 F.3d 344, 352 (5th Cir.2001) (quoting *Long v. Eastfield Coll.,* 88 F.3d 300, 304 (5th Cir.1996)).

This court has determined that only "ultimate employment decisions," "such as hiring, granting leave, discharging, promoting, and compensating" satisfy the "adverse employment action" element of a prima facie case of retaliation. *Dollis v. Rubin,* 77 F.3d 777, 781-82 (5th Cir.1995) (citation omitted). "'[I]nterlocutory or mediate' decision[s] which can lead to an ultimate decision" are insufficient to support a prima facie case of retaliation. *Mattern v. Eastman Kodak Co.,* 104 F.3d 702, 708 (5th Cir.1997). Put differently, the "ultimate employment decision" doctrine requires that actionable adverse employment actions "have more than a 'mere tangential effect on a possible future ultimate employment decision.'" *Mota v. Univ. of Tex. Houston Health Sci. Ctr.,* 261 F.3d 512, 519 (5th Cir.2001) (quoting *Walker v. Thompson,* 214 F.3d 615, 629 (5th Cir.2000)).

The allocation of the burden of proof in Title VII retaliation cases depends on the nature of the plaintiff's evidence supporting the causation element. If the plaintiff seeks to establish causation by circumstantial evidence, the tripartite burden-shifting framework of *McDonnell Douglas* applies. *See Portis v. First Nat'l Bank,* 34 F.3d 325, 328 (5th Cir.1994) ("Because direct evidence is rare, a plaintiff ordinarily uses circumstantial evidence to meet

the test set out in *McDonnell Douglas* [, which] establishes a prima facie case by inference."). Under the *McDonnell Douglas* framework, the plaintiff carries the initial burden of establishing a prima facie case of retaliation. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). At this threshold stage, the standard for satisfying the causation element is "much less stringent" than a "but for" causation standard. *Long,* 88 F.3d at 305 n. 4.

A *McDonnell Douglas* prima facie showing establishes an inference of retaliatory motive that the employer can rebut by producing evidence of a legitimate, non-retaliatory reason for the adverse action. *Evans,* 246 F.3d at 354. If the employer produces such evidence, then the plaintiff has the burden of proving that the Title VII protected activity "was a 'but for' cause of the adverse employment decision." *Long,* 88 F.3d at 305 n.4. "If the plaintiff presents evidence supporting the prima facie case, plus evidence that the reasons given by the employer for the adverse employment action were pretextual, a jury may infer" the existence of this "but for" causation. *Mota,* 261 F.3d at 519-20 (citing *Reeves,* 530 U.S. at 148, 120 S.Ct. 2097).

If, on the other hand, the plaintiff presents direct evidence that the employer's motivation for the adverse action was at least in part retaliatory, then the *McDonnell Douglas* framework does not apply. *See Moore v. U.S. Dep't of Agric.,* 55 F.3d 991, 995 (5th Cir.1995) (noting that because the plaintiffs presented direct evidence of discriminatory animus, they "are entitled to bypass the *McDonnell Douglas* burden-shifting framework commonly applied in discrimination cases and proceed directly to the question of liability"). In such "direct evidence" cases, "the

burden of proof shifts to the employer to establish by a preponderance of the evidence that the same decision would have been made regardless of the forbidden factor." *Brown v. E. Miss. Elec. Power Ass'n,* 989 F.2d 858, 861 (5th Cir.1993).

The district court's summary judgment in favor of TDH rested on two grounds. First, the district court held that Fierros failed to establish the "adverse employment action" element of a retaliation claim because the district court determined that a denial of a pay increase does not, *as a matter of law,* amount to an "adverse employment action" under this court's decision in *Mattern.*[1] Second, the district court found that Fierros presented insufficient evidence of the causation element because she demonstrated only "a subjective belief that TDH's actions were retaliatory in nature." We conclude that both of these determinations are erroneous and that Fierros has introduced sufficient evidence to entitle her to present her retaliation claim to a jury.

A. *Whether the Denial of a Pay Increase Can Be an "Adverse Employment Decision"*

TDH argues that the district court properly interpreted *Mattern* as holding that pay increase denials are not "ultimate employment decisions" as a matter of law,

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[1] In the district court, Fierros claimed that TDH retaliated against her by subjecting her to unjustified disciplinary actions (i.e., the two "counseling sessions") as well as by denying her the merit pay increase. On appeal, however, she bases her retaliation claim only on the pay increase denial. Accordingly, we do not address whether the disciplinary counseling sessions constitute adverse employment actions for Title VII purposes.

and thus cannot form the basis of a Title VII claim. Fierros contends that this court should repudiate its "ultimate employment decision" doctrine because it is contrary to the Supreme Court's decisions in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997), *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), and *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). According to Fierros, these three decisions indicate that this court's "ultimate employment decision" doctrine improperly narrows the scope of Title VII by excluding employment actions such as pay increase denials from the statute's protection.[2]

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[2] In *Robinson, Burlington Industries,* and *Faragher,* the Supreme Court's holdings expanded the category of "employment actions" that may provide the basis for liability under Title VII. In *Robinson,* the Court held that actions by *former* employers are included within the anti-retaliation provision of Title VII. 519 U.S. at 346, 117 S.Ct. 843. In *Burlington Industries* and *Faragher,* the Court held that an employer may be held vicariously liable for an employee's sexual harassment claim in cases in which a "tangible employment action" did not occur. *See Burlington Indus.*, 524 U.S. at 765-66, 118 S.Ct. 2257; *Faragher,* 524 U.S. at 807, 118 S.Ct. 2275. In addition to the generally expansive nature of these cases, *Burlington Industries* and *Faragher* are noteworthy in the context of this court's "ultimate employment decision" doctrine because the Supreme Court sets out a relatively broad definition of "tangible employment action": "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus.*, 524 U.S. at 761, 118 S.Ct. 2257; *see also Faragher,* 524 U.S. at 790, 118 S.Ct. 2275 (stating that tangible employment actions include "hiring, firing, promotion, compensation, and work assignment"). In pointing to *Burlington Industries,* Fierros undoubtedly relies on the Court's conclusion that "[i]n the context of this case, a tangible employment action would have taken the form of a *denial of a raise* or a promotion." 524 U.S. at 761, 118 S.Ct. 2257 (emphasis added).

(Continued on following page)

Fierros paints with a broader stroke than is necessary to decide this case. We need not evaluate whether the "ultimate employment decision" doctrine is undermined by the Supreme Court's recent Title VII decisions because *Mattern* does not hold that the denial of a pay increase can *never* be an "ultimate employment decision." Rather, *Mattern* establishes only that the denial of the pay increase that occurred *in that case* was not an "ultimate employment decision." In reaching that conclusion, we explained that the possibility of a pay increase was significant to the plaintiff only because it was one of the necessary conditions of passing a training program for a new position. The plaintiff's "conten[tion was] that . . . receiving poor evaluations and a missed [pay] increase were 'quickly *leading to the ultimate adverse employment action.*'" *Id.* (emphasis in original). In contrast, in the instant case, Arnold's denial of Fierros's recommended pay increase *is* the employment action from which Fierros sought relief in federal court.

The language of Title VII further supports our reading of *Mattern*. Title VII's anti-retaliation provision makes it unlawful "for an employer to *discriminate* against any of his employees" because the employee engaged in a protected

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This court has recognized that the definition of "tangible employment action" developed in the sexual harassment context in *Burlington Industries* may be the proper "adverse employment action" standard for Title VII retaliation claims, but has not yet decided the issue. *See Watts v. Kroger Co.*, 170 F.3d 505, 510 n. 4, 511 n. 5 (5th Cir.1999) ("We do not reach the question of whether 'tangible employment action,' as defined by [*Burlington Industries*], is identical to our definition of an 'adverse employment action' found in *Mattern*," because "even if *Burlington* lowers the bar as to what qualifies as an adverse employment action, Watts cannot satisfy the definition of a tangible employment action as defined by *Burlington*.") (citations omitted).

activity. 42 U.S.C. § 2000e-3(a) (emphasis added). In *Mattern* we relied on § 2000e-2(a)(1) to ascertain the meaning of "discriminate" in § 2000e-3(a). *See Mattern,* 104 F.3d at 708-09. Subsection 2000e-2(a)(1) provides: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his *compensation,* terms, conditions, or privileges of employment." § 2000e-2(a)(1) (emphasis added). This language clearly contemplates that the denial of a pay increase can be an act of "discrimination" against an employee.

Moreover, in cases since *Mattern,* we have held that a denial of a pay increase and similar actions *are* "ultimate employment decisions." In *Rubinstein v. Administrators of the Tulane Educational Fund,* this court upheld a jury verdict that the employer had unlawfully retaliated against the plaintiff in denying him a pay raise. *See* 218 F.3d 392, 402 (5th Cir.2000). Similarly, in *Mota,* we reasoned that the employer's discontinuation of the plaintiff's stipend qualified as an "ultimate employment decision" because it was "a compensation decision." 261 F.3d at 521; *see also id.* (concluding that the employer's denial of paid leave was an "ultimate employment decision" for purposes of the plaintiff's Title VII retaliation claim).

Conceding that our cases recognize that employment actions affecting compensation are often "ultimate employment decisions," TDH argues that such actions are "ultimate employment decisions" only if the employee's current compensation is reduced. According to TDH, the employment action at issue in the instant case, i.e., a "simpl[e] fail[ure] to receive a modest increase in pay,"

does not rise to the level of an "ultimate employment decision." This distinction is untenable. If Fierros had received the merit pay increase, she would be making a higher salary. The merit pay increase is important to her not only as a recognition of her contribution to TDH as a laboratory technician, but also as a source of income. As Fierros points out, in light of her annual salary of $20,924.97, the $57-per-month pay increase is not, as TDH claims, "de minimis." It is illogical to construe Title VII as prohibiting discriminatory decreases in pay, but permitting discriminatory denials of pay increases.

We hold that in light of our reasoning in *Mattern,* the language of Title VII, and our post-*Mattern* jurisprudence, the denial of a pay increase can be an "ultimate employment decision" actionable under Title VII's anti-retaliation provision. We further conclude that in the instant case, Arnold's denial of Fierros's merit pay increase was an "ultimate employment decision." Fierros seeks Title VII relief from the denial of the pay increase itself, and not from any employment action that the pay increase denial might lead to. Thus, she has established the second element of a prima facie case for retaliation.

Because Fierros's filing of the internal discrimination complaint against Arnold is a Title VII "protected activity," Fierros has also satisfied the first element of the prima facie case for retaliation. *See Dollis,* 77 F.3d at 779, 781 (recognizing that the plaintiff's use of her employer's internal administrative process to file an employment discrimination complaint "is clearly protected activity" for purposes of a Title VII retaliation claim). TDH does not attempt to argue otherwise. Accordingly, Fierros is entitled to a jury trial if she presented sufficient summary judgment evidence of the third element, i.e., that Arnold

denied her the merit pay increase *because* she filed the discrimination complaint against him.

B. Whether the Evidence of Causation Was Sufficient to Survive Summary Judgment

In addition to holding that Fierros failed to assert an "ultimate employment decision," the district court concluded that Fierros failed to present any evidence other than her "subjective belief" that Arnold had a retaliatory motive in denying her the merit pay increase. Although TDH does not defend this second ground of the district court's summary judgment, TDH does insist that we should not consider the evidence of retaliatory motive that Fierros submitted with her motion for reconsideration of the summary judgment. According to TDH, because Fierros did not file that motion until after she filed her notice of appeal, and because she does not attempt to argue in her brief that the district court erred in denying that motion, she may not rely on that evidence in urging this panel to reverse the summary judgment against her.

We need not determine whether it would be appropriate to consider the evidence that Fierros filed with her motion for reconsideration. There is sufficient evidence in the record relied upon by the district court to raise a genuine issue of material fact regarding whether TDH retaliated against Fierros in violation of Title VII. The summary judgment record includes an affidavit in which Fierros states that Arnold told her that she had been denied the pay increase because she filed a discrimination complaint against him. Such an affidavit is *direct* evidence that Arnold had a retaliatory motive because it "is evidence which, if believed, proves the fact [of intentional

retaliation] without inference or presumption." *Brown,* 989 F.2d at 861.

Apparently, the district court concluded that the affidavit evinced only Fierros's "subjective belief" that a retaliatory motive was behind Arnold's decision to deny her the pay increase. But Fierros does not attest to her *belief* that Arnold had a retaliatory motive in her affidavit. She attests that Arnold made a *statement* to her admitting that he had a retaliatory motive. "In the context of Title VII, direct evidence includes any statement or written document showing a discriminatory motive on its face." *Portis,* 34 F.3d at 329; *cf. Rubinstein,* 218 F.3d at 402 (finding that a dean's testimony that he denied a professor a pay raise because the professor filed a discrimination suit against the university "could be no more direct on the issue of retaliation"). Further, in *Portis,* we explicitly rejected the argument that the plaintiff's testimony regarding the employer's discriminatory statements was merely testimony "regarding [the plaintiff's] subjective belief." 34 F.3d at 329. We noted that in contrast to testimony regarding subjective belief, testimony regarding the employer's statements is direct evidence because it "require[s] no additional inference to conclude that [the plaintiff] was [discriminated against]." *Id.*

Unlike a case in which the plaintiff has presented only circumstantial evidence of retaliatory animus, we do not apply the *McDonnell Douglas* burden-shifting framework to determine whether Fierros's direct evidence presents a factual issue for a jury. *See Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985) ("[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination."); *Portis,* 34 F.3d at 328 (same). Fierros's affidavit by

itself precludes summary judgment because it presents a genuine issue of material fact regarding whether "[retaliatory] animus in part motivated or was a substantial factor in the contested employment action." *Brown,* 989 F.2d at 861; *see also Vance v. Union Planters Corp.,* 209 F.3d 438, 442 (5th Cir.2000) (noting that even if the Title VII plaintiff "were the only witness to testify about the [employer's discriminatory] statements [,] that would not warrant taking the case out of the jury's hands"); *Portis,* 34 F.3d at 329-30 n. 10 (reversing the district court's grant of the employer's post-verdict motion for judgment as a matter of law, noting that "the plaintiff's testimony on its own ... is enough to establish intentional discrimination").

Our determination that Fierros has raised a jury question about whether Arnold intended to retaliate against her when he denied her the merit pay increase is further supported by circumstantial evidence. *See Vance,* 209 F.3d at 443 (concluding that while the testimony regarding the employer's discriminatory statements was sufficient direct evidence of discrimination to support the jury's verdict for the plaintiff, this direct evidence was also supported by circumstantial evidence). First, the person who was the subject of Fierros's discrimination complaint (Arnold) was the same person who denied her the pay increase.

Second, the evidence that Fierros produced regarding the two disciplinary "counseling sessions" that she received after filing her EEOC charge further indicates the existence of a retaliatory motive. Although we need not determine whether these two disciplinary actions are "ultimate employment decisions," *see supra* note 1, even if the disciplinary actions do not amount to ultimate employment decisions, they may still evince Arnold's retaliatory motive.

The plaintiff in *Thomas v. Texas Department of Criminal Justice* "presented evidence that after [she filed] EEOC charges she was disciplined twice, and she had never received any disciplinary actions in the 18 years prior to the filing of her charges." 220 F.3d 389, 394 (5th Cir.2000). Although this court held that the disciplinary actions taken against the plaintiff were not "ultimate employment decisions," we noted that "[t]he jury could properly consider" the disciplinary actions "as indications of [the employer's retaliatory] motives in . . . fail[ing] to promote or transfer [the plaintiff]," i.e., the "ultimate employment decisions" at issue. *Id.* at 394 & n. 2.

Fierros's evidence regarding the two counseling sessions is similar to the evidence of disciplinary actions that this court found persuasive in *Thomas.* Fierros was disciplined twice within a two-month period after she filed a second internal discrimination complaint with the OCR and her initial charge with the EEOC. Fierros had been a highly-regarded employee at TDH for over twenty years before she filed the discrimination charges. It is undisputed that Carter recommended that Fierros receive the merit pay increase because of her work performance, and Fierros produced documentary evidence showing that she had maintained an impressive performance record as a TDH employee. Further, Fierros presented evidence that another employee who filed discrimination charges against TDH was also given a counseling session for abuse of the sick leave policy after she filed the charges, and that an employee who had not filed any charges and was otherwise similarly-situated to Fierros (i.e., who engaged in the same conduct as that which formed the basis of the disciplinary action taken against Fierros) was not given counseling sessions.

Even assuming that Fierros had presented only circumstantial evidence and thus that the *McDonnell Douglas* framework applied, she would have raised a factual issue precluding summary judgment. Fierros's circumstantial evidence is certainly sufficient under the initial "much less stringent than 'but for'" standard to establish a prima facie showing of causation. *See Long,* 88 F.3d at 306 (concluding that in light of the evidence that the employer knew about the protected activity and took the adverse employment action thereafter, "we have no trouble finding sufficient evidence, for prima facie case purposes, to establish a causal link"). Because TDH has not offered a non-retaliatory reason for denying Fierros the pay increase that would rebut the inference of retaliatory animus raised by Fierros's prima facie case, Fierros need not establish more than a prima facie case of retaliation to survive summary judgment.

IV. CONCLUSION

We conclude that (1) TDH's denial of Fierros's merit pay increase is an "ultimate employment decision," and (2) Fierros presented sufficient direct evidence of causation to withstand summary judgment. Thus, we REVERSE the district court's judgment in favor of TDH and REMAND to that court for further proceedings. Costs shall be borne by TDH.